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In the Supreme Court of the United States

RICKY HENSON, IAN MATTHEW GLOVER, KAREN PACOULOUTE, F/K/A KAREN WELCOME KUTEYI, AND PAULETTE HOUSE,

Petitioners,

v.

SANTANDER CONSUMER USA, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIAE* THE CLEARING HOUSE ASSOCIATION L.L.C., AMERICAN BANKERS ASSOCIATION, AND CONSUMER BANKERS ASSOCIATION IN SUPPORT OF RESPONDENT

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653 F.3d 912 (9th Cir. 2011) 25

Alibrandi v. *Fin. Outsourcing Servs., Inc.*,
333 F.3d 82 (2d Cir. 2003) 31

Beider v. *Retrieval Masters Creditors Bureau, Inc.*,
146 F. Supp. 3d 465 (E.D.N.Y. 2015) 24

Carter v. *AMC, LLC*,
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Dan's City Used Cars, Inc. v. *Pelkey*,
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Davidson v. *Capital One Bank (USA), N.A.*,
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Epps v. *JPMorgan Chase Bank, N.A.*,
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Huebner v. *Midland Credit Mgmt, Inc.*,
85 F. Supp. 3d 672 (E.D.N.Y. 2015) 28

Jacobson v. *Healthcare Financial Servs.*, 434 F. Supp. 2d 133 (E.D.N.Y. 2006) 29

Jerman v. *Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573 (2010) 10, 27

Schlegel v. *Wells Fargo Bank, NA*, 720 F.3d 1204 (9th Cir. 2013) 16

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12 U.S.C. § 5531 24

12 U.S.C. § 5536 24

12 U.S.C. § 5481 24

Other Authorities:

2 Consumer Law Sales Practices and Credit Regulation § 632 (updated Sept. 2016) 26

123 Cong. Rec. H2925 (Apr. 4, 1977) 13

123 Cong. Rec. S13854 (Aug. 5, 1977) 14, 15

Adam D. Maarec and John C. Morton, *A Survey of Activities Identified as Unfair, Deceptive, or Abusive Under the Dodd-Frank Act* (Jan. 25, 2016) 24

Bd. of Governors of the Fed. Reserve Sys., *Consumer Credit (G.19) Statistical Release December 2016* (Jan. 2017) 4

Consumer Credit & Payments Statistics, Federal Reserve Bank of Philadelphia (Oct. 22, 2015) 4

Consumer Fin. Prot. Bureau, *Ask CFPB: Debt Collection* (last visited Mar. 24, 2017) 28

Consumer Fin. Prot. Bureau Bulletin 2013-07, *Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts* (July 10, 2013) 26

DBA Int'l, *The Debt Buying Industry: A White Paper* (Apr. 2015) 5

Elizabeth A. Duke, Governor, Fed. Reserve Bd. of Governors, Speech: Fostering a Healthy Credit Environment (June 30, 2010) 4

Fed. Deposit Ins. Corp., *Statistics on Depository Institutions Report—Net Loans and Leases* (Dec. 31, 2016) 4

Fed. Reserve Bank of N.Y., *Quarterly Report on Household Debt and Credit* (Feb. 2017) 5

Fed. Trade Comm'n, *The Structure and Practices of the Debt Buying Industry* (Jan. 2013) ..... *passim*

H.R. 5294, 95th Cong. § 802(f) (1977) 12

H.R. Rep. No. 131, 95th Cong., 1st Sess. (1977) 13, 14, 15, 17, 23

James McAndrews, Dir. of Research, Fed. Reserve Bank of N.Y., Remarks at the Econ. Press Briefing on Student Loans, Fed. Reserve Bank of N.Y.: Credit Growth and Econ. Activity after the Great Recession (Apr. 16, 2015) 4, 5

Jim Reber, *The Case for Buying Loans*, Ind. Banker Magazine (Sept. 2009) 8

Office of the Comptroller of the Currency Bulletin 2014-37, *Description: Risk Mgmt. Guidance* (Aug. 4, 2014) 6, 7, 25

Office of the Comptroller of the Currency, Statement Provided to the Subcomm. on Fin. Insts. and Consumer Prot., Senate Comm. on Banking, Hous., and Urban Affairs (July 17, 2013) 6

Rebecca S. Demsetz, *Bank Loan Sales: A New Look at the Motivations for Secondary Mkt. Activity*, 23 Journal of Financial Research 197 (2000) 8

Robert M. Hunt, *Collecting Consumer Debt in Am.*, Fed. Reserve Bank of Phila. Bus. Review 11 (Q2 2007) 14, 16

Santander Consumer USA Holdings Inc., Form 10-K (Feb. 28, 2017) 16, 17

Santander Consumer USA, *Overview* 17

Sec. Indus. and Fin. Mkts. Ass'n, *Statistics: US ABS Issuance and Outstanding, US Mortgage-Related Issuance and Outstanding* (March 20, 2017) 4

S. Rep. No. 382, 95th Cong., 1st Sess. (1977) 14, 15

Todd J. Zywicki, *The Law and Economics of Consumer Debt Collection and Its Regulation*, 28 Loy. Consumer L. Rev. 167 (2016) 7, 14, 30

William P. Hoffman, *Recapturing the Congressional Intent Behind the Fair Debt Collection Practices Act*, 29 St. Louis U. Pub. L. Rev. 549 (2010) 29, 32

INTEREST OF *AMICI CURIAE*[1]

The Clearing House, established in 1853, is the oldest banking association and payments company in the U.S. Its members include the world's largest commercial banks; they hold more than half of all U.S. deposits and employ over one million people in the U.S. and over two million people worldwide. The Clearing House Association L.L.C. is a nonpartisan advocacy organization that represents the interests of its owner banks by developing and promoting policies to support a safe, sound, and competitive banking system that serves customers and communities. Its affiliate, The Clearing House Payments Company L.L.C., is regulated as a systemically important financial market utility. It owns and operates payments technology infrastructure that provides safe and efficient payment, clearing, and settlement services to financial institutions, and clears almost $2 trillion every day.

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel contributed any money to fund its preparation or submission. The parties have consented to the filing of *amicus curiae* briefs in support of either party.

Respondent Santander Consumer USA Inc. is wholly owned by Santander Consumer USA Holdings Inc. Santander Holdings USA, Inc. owns 10% or more of the stock of Santander Consumer USA Holdings Inc. and is a subsidiary of Banco Santander, S.A., which is a member of The Clearing House. Santander Bank, N.A. is a member of the American Bankers Association and the Consumer Bankers Association, and is wholly owned by Santander Holdings USA, Inc.

The American Bankers Association ("ABA") is the principal national trade association of the financial services industry in the United States. Founded in 1875, the ABA is the voice for the nation's $13 trillion banking industry and its more than one million employees. ABA members are located in all fifty States and Washington, D.C. and include large and small financial institutions. The ABA's members hold a substantial majority of the U.S. banking industry's domestic assets and are leaders in all forms of consumer financial services.

The Consumer Bankers Association ("CBA") is the only national financial trade group focused exclusively on retail banking and personal financial services—banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation for its members. CBA members include the nation's largest bank holding companies as well as regional and super-community banks that collectively hold two-thirds of the total assets of depository institutions.

Amici's members actively participate in the United States' multi-trillion dollar debt origination and debt sale markets, which play an essential role in providing the credit to individuals and businesses necessary for the functioning of the American economy. *Amici* have a significant interest in affirmance of the decision below, because petitioners' claims implicate all lenders that purchase, as well as originate, loans.

Respondent's brief thoroughly and persuasively explains why the plain text of the Fair Debt Collection

Practices Act ("FDCPA") does not apply to debt purchasers whose principal business is not debt collection. Accordingly, in this brief, *amici* seek to provide this Court with information concerning the structure, function, and regulation of the debt markets, the concerns Congress faced when enacting the FDCPA, and why the plain language of the FDCPA—which does not include debt purchasers like respondent as "debt collectors"—flows naturally from those concerns. Through this brief, *amici* also explain the comprehensive government regulatory structure and market incentives already applicable to debt purchasers like respondent, thus belying petitioners' inappropriate policy-based argument that affirmance of the Fourth Circuit's decision would unleash a wave of unfair debt collection practices.

Indeed, rather than vindicating Congress' non-existent concerns, reversal of the Fourth Circuit's decision would sharply expand liability—including a private right of action for borrowers—to many debt purchasers (including *amici*'s members), a result that Congress never intended. Extending the FDCPA's private right of action would, in turn, introduce substantial and unnecessary costs and litigation uncertainty into the sale of debt, and thus disincentivize debt origination in the first place. The end result would be harm to *amici*'s members, the financial system, and individuals, especially those of lesser financial means.

BACKGROUND

"Credit availability is a crucial ingredient in any advanced economy's recipe for economic growth because credit can support investment in productive

enterprises and can smooth household spending from fluctuations in income."[2] Commercial banks, such as *amici*'s members, are among the lenders that provide vital access to this credit, especially for small businesses and individuals.[3] As of December 2016, depository institutions held over $9 trillion in outstanding loans on their balance sheets,[4] including over $1.5 trillion in consumer loans.[5] That does not include the approximately $10 trillion in securitized loans that were originated by various lenders, including banks,[6] and then packaged and sold to

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[2] James McAndrews, Dir. of Research, Fed. Reserve Bank of N.Y., Remarks at the Econ. Press Briefing on Student Loans, Fed. Reserve Bank of N.Y.: Credit Growth and Econ. Activity after the Great Recession (Apr. 16, 2015), https://tinyurl.com/mcandrewscreditgrowth; *see also* Elizabeth A. Duke, Governor, Fed. Reserve Bd. of Governors, Speech: Fostering a Healthy Credit Environment (June 30, 2010) ("Credit plays a critical role in our economy."), https://tinyurl.com/dukehealthycredit.

[3] *See Consumer Credit & Payments Statistics*, Fed. Reserve Bank of Phila. (Oct. 22, 2015), https://tinyurl.com/fedreservestatistics.

[4] Fed. Deposit Ins. Corp. ("FDIC"), *Statistics on Depository Institutions Report—Net Loans and Leases* (Dec. 31, 2016), https://tinyurl.com/fdicstatistics.

[5] Bd. Of Governors of the Fed. Reserve System, *Consumer Credit (G.19) Statistical Release December 2016* (Jan. 2017), https://tinyurl.com/fedreserveconsumercredit. In total, according to the Federal Reserve, "major holders" of debt held $3.7 trillion in consumer loans. *Id.*

[6] Sec. Ind. and Fin. Mkts Ass'n ("SIFMA"), *Statistics: US ABS Issuance and Outstanding, US Mortgage-Related Issuance and Outstanding* (March 20, 2017) ("SIFMA Reports"), https://tinyurl.com/sifmastatistics.

investors, or the large volume of loans originated and sold outside of securitizations.[7] These loans include consumer loans (*e.g.*, credit card loans, auto loans, other personal loans) and residential loans (primarily home mortgages).[8] Because of banks' central role in these vitally important credit markets, economists have recognized that "the impairment of banks' ability to extend credit . . . has the potential to hinder investment and adversely affect the overall economy."[9]

Although the vast majority of consumer debts are paid in their ordinary course,[10] some debts become delinquent. For instance, as of December 31, 2016, "4.8% of outstanding debt was in some stage of delinquency."[11]

Banks obviously "have the responsibility [to their shareholders] to attempt to collect . . . and to recover

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[7] *See, e.g.*, Fed. Trade Comm'n ("FTC"), *The Structure and Practices of the Debt Buying Industry* ii, 7 (Jan. 2013) ("FTC *Structure and Practices*"), https://tinyurl.com/ftcstructureandpractices.

[8] SIFMA Reports, *supra*.

[9] McAndrews, *supra*.

[10] According to one analysis, 95% of all consumer debt is paid on time. DBA Int'l, *The Debt Buying Industry: A White Paper* 6 (Apr. 2015), https://tinyurl.com/dbawhitepaper.

[11] Fed. Reserve Bank of N.Y., *Quarterly Report on Household Debt and Credit* (Feb. 2017), https://tinyurl.com/fedreserve2016Q4 (noting that there was "$607 billion of [household] debt that [wa]s delinquent").

losses associated with . . . bad debt."[12] To meet that responsibility, "[m]ost original creditors try to collect on debts before selling them to others, whether by collecting on the debts themselves, [or] hiring . . . third-party debt collectors."[13] Another option is to sell the non-performing debt to other institutions, which will then seek to collect on it for their own accounts. As of 2013, the 19 largest banking organizations "sold about $37 billion in charged-off debt [on average] . . . in each of the past few years."[14]

As the Federal Trade Commission observed, selling debt permits lenders to recoup billions of dollars on non-performing debt every year, "*thereby allowing creditors to provide more credit at lower prices*" to other borrowers.[15] Banking regulators recognize that "banks can benefit from debt-sale arrangements by turning non[-]performing assets into

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[12] Statement of the Office of the Comptroller of the Currency Provided to the Subcomm. on Fin. Insts. and Consumer Prot., Senate Comm. on Banking, Hous., and Urban Affairs 10 (July 17, 2013) ("OCC 2013 Statement") (footnote omitted), https://tinyurl.com/OCC2013statement; *see also* Office of the Comptroller of the Currency, OCC Bulletin 2014-37 (Aug. 4, 2014) ("OCC Bulletin 2014-37"), https://tinyurl.com/OCC2014bulletin (citing "a responsibility to [banks'] shareholders to recover losses" on charged-off debt).

[13] FTC *Structure and Practices*, *supra*, at 17.

[14] OCC 2013 Statement, *supra*, at 3.

[15] *See* FTC *Structure and Practices*, *supra*, at i (emphasis added) ("Debt buying can reduce the losses that creditors incur in providing credit, thereby allowing creditors to provide more credit at lower prices.").

immediate cash proceeds and reducing the use of internal resources to collect delinquent accounts."[16] Debt purchasers "increase liquidity in the consumer credit system. . . . By selling distressed debt, lenders can convert non[-]performing debt into liquid assets that can be used productively."[17]

There generally are two categories of entities that purchase, and then seek to collect on, non-performing debt: (1) firms whose principal business is debt collection, whether on purchased debt or as a third-party service offered to creditors; and (2) firms that principally engage in other businesses, including lending directly to borrowers. A debt purchaser in the second category, like respondent, Santander Consumer USA Inc. ("Santander"), may purchase non-performing debt as part of a larger pool of loans containing both performing and non-performing debt. *See Henson* v. *Santander Consumer USA, Inc.*, 817 F.3d 131, 134 (4th Cir. 2016).[18] Purchasing such pools may help a financial institution like Santander strengthen its balance sheet, enhance earnings, and

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[16] OCC Bulletin 2014-37, *supra*.

[17] Todd J. Zywicki, *The Law and Economics of Consumer Debt Collection and Its Regulation*, 28 Loy. Consumer L. Rev. 167, 213 (2016) (footnote omitted). A 2013 FTC study observed that the nine largest debt buyers, in a three-year period, purchased nearly 90 million consumer accounts with a face value of $143 billion. *See* FTC, *Structure and Practices*, *supra*, at i-ii.

[18] "The portfolio contained not just defaulted loans . . . but also non-defaulted loans." Resp't Br. 7.

manage capitalization.[19] Financial institutions (like Santander) that originate and service loans, some of which become non-performing, can seamlessly integrate the purchased loans (both performing and non-performing) into their existing portfolios.[20]

SUMMARY OF ARGUMENT

I. A. As Santander's brief ably demonstrates, the FDCPA's plain text does not include debt purchasers if their principal business purpose is not debt collection. This was a deliberate choice on Congress' part. In enacting the FDCPA, Congress did not attempt to apply the statute to all purchasers of debt, but specifically targeted three categories of entities: (i) those that function principally as debt collectors (*i.e.*, independent debt collectors); (ii) those that regularly seek to collect debt owed to *others*; or (iii) those that fail to use their own names when collecting debt. Congress was concerned that those specific categories of entities were engaged in abusive debt

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[19] *See* Jim Reber, *The Case for Buying Loans*, Indep. Banker Magazine 52-53 (Sep. 2009), https://tinyurl.com/icbaloans (explaining that debt purchasers include "institutions looking to deploy capital faster than they could organically, institutions with low loan demand and declining margins, and community banks with excess liquidity due to deposit growth. . . . Buyers end up with a pool of loans that meet their underwriting guidelines and yield requirements. The ability to manage credit risk combined with compelling yields make loans an attractive asset class in today's market.").

[20] *See* Rebecca S. Demsetz, *Bank Loan Sales: A New Look at the Motivations for Secondary Mkt. Activity*, 23 J. Fin. Research 197, 201 (2000) (banks may "use loan sales and purchases to rebalance a portfolio of a given size").

collection practices, because those entities (i) were effectively immune from then-existing regulatory oversight due to, among other things, their proven adeptness at dissolving themselves and reconstituting quickly under a different name, and (ii) had little incentive to maintain positive, ongoing relationships with borrowers.

Accordingly, Congress determined that a federal private right of action on behalf of borrowers was needed to deter and punish those entities and provided for such right in the FDCPA.

By contrast, Congress made the carefully calibrated decision that it did not need to provide borrowers with a private right of action like that provided under the FDCPA against institutions like Santander, which principally engage in businesses other than collecting on debt. These institutions were already subject to meaningful deterrence against abusive practices through what Congress viewed as effective ongoing regulatory supervision, state law remedies, and naturally strong reputational and business incentives to establish or maintain positive, ongoing customer relationships.

B. As a result, the FDCPA does not apply to all institutions that attempt to collect debt from borrowers. Rather, it applies only to a specifically defined group of "debt collectors," as set forth in the statute. As the Fourth Circuit correctly held, that definition plainly does not include entities like Santander, whose principal business is the origination of loans and who also purchase debt and seek to collect on it for their own accounts.

II. Contrary to the parade of horribles presented by petitioners and their *amici*, the Fourth Circuit's decision will not result in an increase of unfair, deceptive, or abusive practices. Financial institutions offering consumer credit services, like Santander, are already effectively constrained by reputational concerns, as well as federal and state laws that Congress identified when it consciously chose not to include such entities as "debt collectors" under the FDCPA.

III. A. Reversal, and extension of the FDCPA to companies like Santander, would instead result in a boon to the "'cottage industry' of litigation that has arisen out of the FDCPA." *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 617 (2010) (Kennedy, J., joined by Alito, J., dissenting). These companies would, in petitioners' view, be labeled "debt collectors" not only when collecting on loans that were in default when purchased, but even when collecting on loans that the companies themselves originated—a dramatic expansion of FDCPA private litigation. Such a result would add legal uncertainty and, therefore, costs for all players in the multi-trillion dollar debt markets.

B. Those added costs would have pernicious systemic effects, thereby rendering credit scarcer and more expensive for all in the debt origination market, and particularly for lower-income individuals, whose debt is more likely to go into default. Further, the threat of FDCPA class action liability may well deter some financial institutions from purchasing debt at all, leaving the specialized debt collectors that Congress targeted in the FDCPA as even bigger

players in the market—exactly the opposite of what Congress intended.

ARGUMENT

As Santander persuasively demonstrates in its brief, the Fourth Circuit's decision is consistent with the plain text of the FDCPA. Resp't Br. 24-33. That plain text arose out of a clear Congressional desire to not apply the statute to debt purchasers like Santander. Reversal would go against legislative purpose and, as a policy matter, would not improve an already effective regulatory framework applicable to debt purchasers such as Santander. Instead, reversal would only serve to benefit class action lawyers at significant cost to consumers and the financial system.

I. THE FOURTH CIRCUIT CORRECTLY INTERPRETED THE FDCPA.

A. Congress Did Not Intend to Include Debt Purchasers Like Santander In the FDCPA.

Though any decision of this Court can begin and end with the plain text of the statute,[21] *amici* herein provide for this Court the basic background of the FDCPA's enactment to help elucidate Congressional intent.

Though debt purchasing was not as prevalent when the FDCPA was enacted in the 1970s,[22] the legislative record demonstrates that Congress made an

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[21] *See* Resp't Br. 24-33.

[22] *See* FTC *Structure and Practices*, *supra*, at 12.

intentional decision not to include in the FDCPA—and thus not to create a private right of action against—debt purchasers whose primary business is not debt collection. In debate preceding passage through the House of a bill that contained materially identical language to what was ultimately included in the FDCPA,[23] Representative Wylie, the ranking minority member of the Subcommittee on Consumer Affairs and one of the introducers of the bill, indicated that a firm in the position of Santander today would not be included in the statute:

> REP. CHAPPELL: Is there anything in the bill against a bank collecting?
>
> REP. WYLIE: No, sir.
>
> REP. CHAPPELL: Would they be prohibited from the same actions? I am concerned about the device which might be used which would take the bill that is owed from the first owner into a collection agency which then becomes a bona fide owner. How do we address that?
>
> REP. WYLIE: *I would say if he becomes a bona fide owner of a debt and his primary business is "not" debt collecting then he is not*

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[23] *See* H.R. 5294, 95th Cong. § 802(f) (1977) ("The term 'debt collector' means any person who engages in any business the principal purpose of which is the collection of any debt, or any person who directly or indirectly collects or attempts to collect a debt owed or due or asserted to be owed or due another, and who uses any instrumentality of interstate commerce in connection with such collections.").

> *covered by the bill. He is not an independent debt collector.*

123 Cong. Rec. H2925 (Apr. 4, 1977) (emphasis added).

This exchange is echoed in the Senate and House reports on the FDCPA, which, as described below, further confirm that Congress did not intend to subject entities like Santander—*bona fide* owners of the debt they seek to collect, and not principally engaged in the debt collection business—to the Act's coverage. The result of Congress' concern was a statute that applies specific deterrent and punishment provisions, including a private right of action, to a targeted set of entities—independent "debt collectors"—and not to financial institutions like Santander, which Congress determined were already deterred from improper behavior by the existing regulatory regime. That is why the House Report, in providing "instructive" "illustrations of those persons who are not intended to be included in the term 'debt collector,'" lists "banks, retailers, credit unions or finance companies." H.R. Rep. No. 131, 95th Cong., 1st Sess. 4 (1977).

Congress carved these entities out for three reasons. First, Congress specifically identified the actions of independent debt collection firms as prompting the need for legislation. The Senate Report explains that "[h]earings before the Consumer Affairs Subcommittee revealed that independent debt collectors are the prime source o[f] e[g]regious collection practices. While unscrupulous debt collectors comprise only a small segment of the

industry, the suffering and anguish which they regularly inflict is substantial." S. Rep. No. 382, 95th Cong., 1st Sess. 2 (1977); *see also* 123 Cong. Rec. S13854 (August 5, 1977) (statement of Sen. Riegle). To Congress, these "[i]ndependent debt collectors constitute[d] an industry separate from creditors. Debt collectors' business is the collection of debts." H.R. Rep. No. 131, *supra*, at 7.

Second, Congress noted that creditors not covered by the FDCPA were "usually larger and more stable," and more susceptible to regulatory deterrence, than independent debt collectors. *Id.* "[I]f a Federal agency such as the Federal Trade Commission takes action against a major creditor, it usually has a deterrent effect throughout the industry. This is not the case with the debt collection industry." *Id.* Indeed, Congress noted "that the [Federal Trade] Commission has had little success regulating debt collectors. . . . . [B]ecause there are so many small debt collection agencies and they can easily go out of business after suit by the Commission, suing 15 or 20 individual debt collection agencies does not change industrywide practices." *Id.*[24]

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[24] *See also* Zywicki, *supra*, at 177 ("First, many lenders, especially financial institutions, were subject to ongoing supervision by banking regulators; thus, their improper practices were thought [by Congress] to be easier to detect and punish than were those of debt collectors. Second, barriers to entry in the industry were low, so it was feared that if a firm was disciplined, its employees could easily form again under a different name or in a different state with minimal effort. Thus, deterrence was thought to be weaker for third-party collectors than for originating creditors."); Robert M. Hunt, *Collecting Consumer Debt in Am.* Phila. Fed. Reserve Bank

Finally, Congress emphasized that "debt collectors" should not include financial institutions that sell products and services to individuals, because such institutions are concerned about their reputations and goodwill. Both the House and Senate Reports identify this as the key distinction between creditors and covered "debt collectors." *See* H.R. Rep. No. 131, *supra*, at 7 ("Independent debt collectors constitute an industry separate from creditors. Debt collectors' business is the collection of debts. Unlike creditors, they do not offer to sell any product or service to consumers."); S. Rep. No. 382, *supra*, at 2 ("Unlike creditors, who generally are restrained by the desire to protect their good will when collecting past due accounts, independent collectors are likely to have no future contact with the consumer and often are unconcerned with the consumer's opinion of them."); *see also* 123 Cong. Rec. S13854, *supra*. Indeed, petitioners admit that Congress "had in mind" for exclusion from the FDCPA those creditors that "must balance the desire to collect fully on their debts against the need not to alienate existing customers or establish a bad reputation among potential future customers." Pet'rs Br. 34.

Bus. Rev. 20 (Q2 2007) ("The FTC took the position that it was easier for regulators to discipline financial institutions than to discipline debt collectors. It argued that barriers to entry into the collections business were so low that actions taken against existing firms did little to deter the behavior of new firms entering the business. Others argued that financial institutions were already more heavily regulated, and the limited data available at the time suggested that most complaints were about the conduct of the third-party collectors.").

As a practical matter, the decision not to include entities like Santander as "debt collectors" may well have been necessary for the FDCPA's passage: "The act passed by only one vote in the House of Representatives," and, commentators have observed, "if the act had been written to include creditors, it is likely the bill would not have passed."[25]

The fundamental characteristics that led Congress to exclude certain creditors from the FDCPA in 1977 clearly apply to consumer-finance companies like Santander, and to the commercial bank defendants in the Eleventh Circuit and Ninth Circuit cases where the courts also refused to extend FDCPA liability. *See Davidson* v. *Capital One Bank (USA), N.A.*, 797 F.3d 1309 (11th Cir. 2015); *Schlegel* v. *Wells Fargo Bank, NA*, 720 F.3d 1204 (9th Cir. 2013). These companies are not principally engaged in debt collection and instead originate loans as a crucial part of their businesses[26]; are subject to regulation by multiple government agencies[27]; are generally large

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[25] Hunt, *supra*, at 20.

[26] *See, e.g.*, *Henson*, 817 F.3d at 140 (labeling Santander a "consumer finance company" that, *inter alia*, "lends money"); *Davidson*, 797 F.3d at 1311 ("[D]ebt collection is only some part of, and not the principal purpose of, Capital One's business."); *Schlegel*, 720 F.3d at 1209 ("The complaint fails to provide any factual basis from which we could plausibly infer that the principal purpose of Wells Fargo's business is debt collection.").

[27] *See, e.g.*, Santander Consumer USA Holdings Inc., Form 10-K 19-20 (Feb. 28, 2017) ("Santander 2016 10-K"), https://tinyurl.com/santander10k ("We operate in a highly regulated industry and continually changing federal, state, and local laws and regulations could materially adversely affect our business, financial

and stable[28]; sell a broad array of products in the market[29]; and, thus, are concerned about their reputations and goodwill.[30] Accordingly, when these

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condition and results of operations. . . . [W]e are directly and indirectly subject to certain banking and financial services regulations, including oversight by the [Federal Reserve Bank of Boston], the [European Central Bank], and the OCC. . . . From time to time, we are or may become involved in formal and informal reviews, investigations, examinations, proceedings, and information-gathering requests by federal and state government and self-regulatory agencies, including, among others, the [Federal Reserve Bank of Boston], the Consumer Financial Protection Bureau ("CFPB"), the [Department of Justice], the [Securities and Exchange Commission], the FTC and various state regulatory and enforcement agencies."); *see also infra* 27-28 (discussing existing law and regulation).

[28] H.R. Rep. No. 131, *supra*, at 7 ("Creditors, unlike debt collectors, are usually larger and more stable."); *see* Santander Consumer USA, *Overview* (last visited Mar. 22, 2017), https://tinyurl.com/santanderoverview ("Santander Consumer USA Holdings Inc. . . . began originating retail installment contracts in 1997, has a serviced portfolio of more than $40 billion (as of September 30, 2014), [and] has more than two million customers across all credit grades").

[29] Santander 2016 10-K, *supra*, at 6 ("[T]he Company offers a full spectrum of auto financing products and services under the Chrysler Capital brand . . . . The Company also originates vehicle loans through a web-based direct lending program").

[30] *See id.* at 24 ("Our ability to attract consumers is highly dependent upon external perceptions of our level of service, trustworthiness, business practices, and financial condition. Negative publicity about such matters, our alleged or actual practices, or our industry generally could adversely affect our business, financial condition and results of operations, including our ability to retain and attract employees.").

companies purchase debt and collect on it for their own accounts, they are not covered by the FDCPA.

B. As Santander Explains, the Plain Language of the FDCPA Is Fully Consistent with Congressional Intent.

Congress sought to address its specific concerns about debt collection practices by including only independent "debt collectors," a subset of actors in the market, in the FDCPA. Rather than applying the FDCPA to any entity that seeks to collect debt, which would have included every lender, Congress made clear that the FDCPA applies only to: (1) "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts"; (2) "any person . . . who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another"; or (3) "any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts." 15 U.S.C. § 1692a(6). This specific and exclusive definition of "debt collectors" does not include Santander, which, as a small part of its overall business, purchased a $3.5 billion pool of debt to collect for its *own* account.

Petitioners acknowledge that "[t]here is no claim that Santander falls within the [first] 'principal purpose' definition" of "debt collectors." Pet'rs Br. 16 n.31. Rather, as the Fourth Circuit observed, Santander is "a consumer finance company" that "lends money" and "otherwise engages in borrowing and investing its capital." *Henson*, 817 F.3d at 140.

Likewise, there is no allegation that Santander falls within the third prong of the "debt collector" definition, as Santander did not use any name other than its own in seeking to collect debt.

Petitioners therefore attempt to rely on the FDCPA's second definition of "debt collector." They argue that, even though Santander purchased the relevant debt and was collecting solely for its *own* account, Santander was actually collecting on debt "owed . . . *another*"—*i.e.*, debt that had, at origination, been owed to the originator. Pet'rs Br. 27-33. Petitioners admit, however, that this "may not be the most natural interpretation of the phrase standing in isolation." Pet'rs Br. 26-27. Petitioners' interpretation is indeed unnatural: at the relevant time, when Santander was allegedly collecting on petitioners' debt, the debt was "owed" to Santander, and *not* to the originator. Any other interpretation unreasonably stretches the text. Petitioners' interpretation would also result in a sweeping expansion of the FDCPA to include any purchaser of debt that subsequently sought to collect on any loans that at the time of sale were delinquent, even if the purchaser's principal business is not debt collection. In petitioners' view, such purchaser would be a "debt collector" subject to the FDCPA not just when collecting on debts purchased in default, but even when collecting on loans the lender itself originated.[31]

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[31] *See* Pet'rs Br. 53-56 ("Congress provided that defendants who regularly collect debt 'owed or due another' are debt collectors, full stop. . . . Santander therefore qualifies as a debt collector under the main 'regularly collects' definition, and the Act therefore applies to *all* of its collection efforts . . . ." (emphasis in original)).

It makes a mockery of Congress' effort to tailor carefully its statute for its intended purpose.

Santander's brief compellingly explains why petitioners' interpretation is inconsistent with the plain text of the FDCPA.[32] As Santander explains, "debts owed" and "debts . . . due" are written in the present tense. Resp't Br. 17. If Congress had intended for these phrases to apply to debts owed to the purchasing entity but originated by another entity, it had far simpler ways at its disposal to draft the statute, *e.g.*, by including "debts originated by another" or inserting the word "were" between "debts" and "owed."

Petitioners' reliance on the FDCPA's reference to "debts 'owed' another"—rather than "debts 'owing' another"—and argument that "owed," specifically, should be read to refer to the original creditor, is also without merit. Pet'rs Br. 28 (emphases in original). Indeed, another provision of the FDCPA requires, in certain circumstances, a debt collector to "send the consumer a written notice containing . . . the name of the creditor *to whom the debt is owed*." 15 U.S.C. § 1692g(a)(2) (emphasis added). Petitioners admit, as they must, that a debt purchaser like Santander, and not the originator, would be considered the "creditor to whom the debt is owed" for purposes of this provision. *See* Pet'rs Br. 47 ("It would make sense to require a debt purchaser to inform the debtor that payment of the debt is now due the purchaser . . . .").

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[32] *See* Resp't Br. 15-36.

Unable to explain how Santander qualifies under the FDCPA's specific definition of "debt collector," petitioners proceed backwards from the statute's *exclusion* from "debt collector" status of "any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . concerns a debt which was not in default at the time it was obtained by such person." 15 U.S.C. § 803(6)(F)(iii). Petitioners argue that, for this exclusion to have any effect, the second definition of "debt collector"—"any person . . . who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another"—must reach debt purchasers who "obtained the debt by assignment after the debt had fallen into default." Pet'rs Br. 48.

Even if petitioners were correct that an exclusion from a statutory definition should dictate whom the definition includes (as opposed to excludes), *but see Dan's City Used Cars, Inc.* v. *Pelkey*, 133 S. Ct. 1769, 1780 (2013), petitioners' argument is based on the fundamental misconception that debt may *only* be "obtained" through outright "purchase." In fact, multiple courts have held that petitioners' critical assumption is *incorrect*: "obtained" under the FDCPA may refer to obtaining a loan for servicing, short of outright purchase. *See Carter* v. *AMC, LLC*, 645 F.3d 840, 843 (7th Cir. 2011) ("At least four courts of appeals, including ours, have concluded that a servicing agent for a mortgage loan 'obtains' the debt even though the bank owns the note."). Thus, when read with a basic understanding of how debt markets work, the statutory exclusion on which petitioners rely is clearly intended to exclude *servicers* of

non-defaulted debt, who would otherwise be included in the FDCPA's definition of "debt collector." There was no need to exclude entities like Santander from the definition of "debt collector," because those entities were not covered by the definition in the first place (regardless of whether the relevant debt was in default or not).

II. FINANCIAL INSTITUTIONS LIKE SANTANDER THAT PROVIDE CONSUMER SERVICES ARE ALREADY SUBJECT TO SEPARATE AND EFFECTIVE REGULATORY REGIMES.

Petitioners and their *amici* argue that extension of the FDCPA is necessary to prevent unfair debt collection practices on defaulted debt by debt purchasers whose principal business is not debt collection. Even if that argument were an appropriate one for this Court—rather than Congress—to resolve, there is no basis for petitioners' fear: debt purchasers whose principal business is not debt collection are already effectively regulated (and have been for decades). The real change petitioners seek has little to do with abusive practices, and much to do with expanding the FDCPA's private right of litigation, thereby extending the "cottage industry" of FDCPA class action litigation into another market.

First, as discussed *supra*, consumer-finance companies like Santander already have strong reputational and business incentives to refrain from abusive practices when collecting debt (whether performing or defaulted). Congress cited those same incentives in explaining why it did not include certain classes of creditors in the FDCPA.

Second, Congress determined that, unlike specialized independent debt collectors, debt purchasers, including consumer finance companies like Santander and other financial entities, were already subject to the deterrent effect of other legal regimes that addressed the abuses petitioners and their *amici* purportedly fear.

For instance, the Federal Trade Commission Act of 1914 ("FTCA") declares unlawful "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1).[33] In enacting the FDCPA, Congress expressed a belief that the FTCA already effectively regulated "major creditor[s]": "[I]f a Federal agency such as the Federal Trade Commission takes action against a major creditor, it usually has a deterrent effect throughout the industry. This is not the case with the debt collection industry." H.R. Rep. No. 131, *supra*, at 7.

Congress has subsequently added other regulatory tools concerning debt purchasers' attempts to collect debt that they have purchased. For example, the Consumer Financial Protection Act of 2010 (Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act) makes it unlawful for "any covered person or service provider . . . to engage in any unfair, deceptive, or abusive act or practice" (or "UDAAP").

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[33] The FTCA empowers the Federal Trade Commission to enforce this provision as to non-banks. 15 U.S.C. § 45(a)(2). The Federal Deposit Insurance Act in turn empowers federal banking agencies to take appropriate enforcement actions against depository institutions and their subsidiaries for violations of any "law, rule, or regulation," including this section of the FTCA. 12 U.S.C. § 1818(b).

See 12 U.S.C. § 5536(a)(1)(B). Contrary to the FDCPA's narrow application to "debt collectors," Title X applies to any "covered person," defined broadly to include "any person that engages in offering or providing a consumer financial product or service." 12 U.S.C. § 5481(6)(A). The Act also empowers the CFPB to bring enforcement actions against covered persons or service providers who are engaged in UDAAPs, and to "prescribe rules" that identify and prevent UDAAPs. 12 U.S.C. § 5531(a)-(b).[34]

These UDAAP provisions further regulate the debt collection activities of financial institutions that are not included in the FDCPA. Indeed, the CFPB has observed that the FDCPA's scope is relatively limited, in contrast to Title X's application to a broader array of financial institutions, including those who primarily offer consumer credit services: "Although the FDCPA's definition of 'debt collector' does not include some persons who collect consumer debt, all covered persons and service providers must

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[34] Courts have determined that no private right of action is created by these provisions. *See, e.g.*, *Beider* v. *Retrieval Masters Creditors Bureau, Inc.*, 146 F. Supp. 3d 465, 471-72 (E.D.N.Y. 2015); *see also infra* 29-31 (discussing the FDCPA private right of action and litigation regime). The CFPB has, however, actively policed the UDAAP provisions through its enforcement authority. *See* Adam D. Maarec and John C. Morton, *A Survey of Activities Identified as Unfair, Deceptive, or Abusive Under the Dodd-Frank Act* 1 (Jan. 25, 2016), http://preview.tinyurl.com/maarecudaap ("Between July 1, 2015 and December 31, 2015, the CFPB engaged in 25 public enforcement actions involving alleged UDAAP violations.").

refrain from committing UDAAPs in violation of the Dodd-Frank Act."[35]

The OCC has also taken an active role in requiring debt sales to be made only to purchasers that comply with applicable consumer protection laws, thereby indirectly regulating debt purchasers. OCC bank examinations "assess management oversight of debt-sale arrangements and focus on compliance with applicable consumer protection statutes," and the OCC has required debt sellers to "[p]erform appropriate due diligence when selecting a debt buyer" and to "[i]mplement appropriate oversight of the debt-sale arrangement."[36]

State regulatory regimes add another layer of protection.[37] As the CFPB states on its website: "Most states have laws about debt collection practices, many of which are similar to the FDCPA. Some of those state laws cover the original creditor, while others don't. States also have Unfair and Deceptive Acts and Practices laws that may apply to

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[35] *See* CFPB Bulletin 2013-07, Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts (July 10, 2013), https://tinyurl.com/cfpb2013bulletin.

[36] OCC Bulletin 2014-37, *supra*.

[37] Some courts have held that state debt collection laws generally are not preempted by federal statutes or regulation. *See Aguayo* v. *U.S. Bank*, 653 F.3d 912, 916 (9th Cir. 2011) (state laws "directed toward debt collection . . . not preempted by the [National Bank Act]"); *Epps* v. *JPMorgan Chase Bank, N.A.*, 675 F.3d 315, 325-26 (4th Cir. 2012) (same).

debt collection."[38] More specifically, "[a]bout twelve [states] have comprehensive laws regulating the debt collection process" which "regulate . . . both creditors and independent collection agencies," and, "[u]nlike the [FDCPA], [these] comprehensive state debt collection laws generally apply to merchants and other commercial entities attempting to collect their own debts."[39]

Petitioners and their *amici* emphasize that not *all* states regulate debt collection by debt purchasers like Santander. But that reflects a deliberate, democratic choice by those states, and not a gap that a federal law should be stretched to fill. The undisputed fact that many states *do* regulate in this area only confirms that fears of increased abusive practices are unfounded.

III. REVERSAL WOULD INCREASE COSTS IN THE DEBT SALE AND ORIGINATION MARKETS, AND WOULD HARM THE FINANCIAL SYSTEM AND CONSUMERS.

A. Reversal Would Introduce a Costly Litigation "Cottage Industry" Into an Already Well-Regulated Arena.

Why are petitioners pushing this case? The answer is simple: applying the FDCPA to creditors like Santander would open them up to the FDCPA's

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[38] Consumer Fin. Prot. Bureau, *Ask CFPB: Debt Collection* (last visited Mar. 24, 2017), http://tinyurl.com/cfpbdebtcollection.

[39] 2 Consumer Law Sales Practices and Credit Regulation § 632 (updated Sept. 2016).

private right of action (including class actions), and thus give plaintiffs' lawyers an entirely new set of targets. Indeed, in petitioners' view, creditors like Santander would be subject to "debt collector" status not only when they collect on debts purchased in default, but even when they collect on debt they themselves originated, a massive expansion of FDCPA private litigation.

Members of this Court have observed an "already troubling dynamic" under the FDCPA "of allowing certain actors in the system to spin even good-faith, technical violations of federal law into lucrative litigation, if not for themselves then for the attorneys who conceive of the suit." *Jerman*, 559 U.S. at 617 (Kennedy, J., joined by Alito, J., dissenting) ("The case illustrates how a technical violation of a complex federal statute can give rise to costly litigation with incentives to settle simply to avoid attorney's fees."). A "'cottage industry' of litigation . . . has arisen out of the FDCPA," and attorney's fee awards and damages have become divorced from any "assessment of the suit's utility." *Id.*

Other courts have made similar observations. One district court judge recently lamented:

> In this Court, . . . and I suspect in many others, the use of the [FDCPA] has evolved into something quite different than its original purpose would suggest. The majority of cases that I see under the statute are brought by a handful of the same lawyers, based on complaints that read

> much more like legal briefs than complaints. . . .
>
> These cases are often brought for the non-salutary purpose of squeezing a nuisance settlement and a pittance of attorneys' fees out of a collection company, which it will often find cheaper to pay than to litigate. A cottage industry among limited players—plaintiffs' lawyers, debtors, and even defendants' lawyers—appears to be the primary progeny of the statute. . . .
>
> Thus, despite misgivings as to what this statute has become, this Court has applied the statute, to the best of its ability, according to its language and the controlling case law that construes it, leaving it to Congress or higher courts to correct any excess application of the statute.

Huebner v. *Midland Credit Mgmt.*, 85 F. Supp. 3d 672, 673 (E.D.N.Y. 2015); *see also Fed. Home Loan Mortg. Corp.* v. *Lamar*, 503 F.3d 504, 513-14 (6th Cir. 2007) ("Ironically, it appears that it is *often the extremely sophisticated consumer who takes advantage of the civil liability scheme defined by this statute, not the individual who has been threatened or misled.* The cottage industry that has emerged does not bring suits to remedy the 'widespread and serious national problem' of abuse that the Senate observed in adopting the legislation . . . . Rather, the inescapable inference is that the judicially developed standards have enabled a class of professional plaintiffs." (emphasis in original) (quoting, and

"echo[ing] sentiments and concerns" expressed in *Jacobson* v. *Healthcare Fin. Servs.*, 434 F. Supp. 2d 133, 138-39 (E.D.N.Y. 2006))).[40]

Extension of this problematic litigation regime to debt purchasers like Santander, which are already subject to effective regulatory and reputational constraints, would provide no benefit, but impose heavy costs. As discussed in the next section, those costs would be borne not just by the debt purchasers, but by borrowers as well.

B. Extending FDCPA Liability to Debt Purchasers Like Santander Would Harm Individuals and the Financial System.

Petitioners suggest that there is something inherently suspicious about buying "defaulted" debt—highlighting, for example, that such debt is often purchased for "pennies on the dollar" by firms that then "seek to collect on purchased debts themselves." Pet'rs Br. 8 (quotation omitted). But what petitioners deem suspicious is the effective working of the marketplace: as discussed *supra*, sales and purchases of non-performing debt can reduce lender losses, help maintain systemic liquidity, and make credit more accessible and cheaper. Introducing the prospect of

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[40] *See also* Note, William P. Hoffman, *Recapturing the Congressional Intent Behind the Fair Debt Collection Practices Act*, 29 St. Louis U. Pub. L. Rev. 549, 550 (2010) ("[A]n onslaught of litigation has ensued, pitting the unwitting consumer against the often fair and honest collector. In the end, the losers are creditors, consumers, and the taxpayers who support our courts, suffering at the expense of consumer-advocacy attorneys.")

FDCPA class action liability to financial institutions like Santander would make it costlier for them to participate in the debt purchase market, reducing market participation and lowering the price purchasers are willing to pay for offered debt—or quite possibly making them unwilling to purchase it at any price—with negative systemic effects.

First, the threat of being labeled a "debt collector" subject to FDCPA liability for buying any loans that are in default at the time of purchase naturally would discourage financial institutions from purchasing such loans. This result would have significant effects upstream in the debt origination market, where originators will raise interest rates on—or pull back entirely from—loans with a higher risk of default due to reduced liquidity, *i.e.*, the increased difficulty of selling those loans.

If a lender is "unable to accurately price the risk of [a] loan . . . then the lender will reduce its risk exposure either by lending to fewer borrowers, in particular by limiting credit offered to higher-risk borrowers, or by lending less to the same borrowers by reducing credit lines and loan size. . . . Because at the time of making a loan a lender cannot perfectly predict which particular borrowers will eventually default, *all* potential borrowers will be forced to pay higher costs for credit, but especially riskier borrowers."[41] Individuals unable to access credit through traditional financial institutions will be

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[41] Zywicki, *supra*, at 183-84 (footnote omitted) (emphasis in original).

required to "turn to more expensive and less preferred alternatives such as payday loans or pawnshops."[42]

Second, attaching potential FDCPA liability to any defaulted loans purchased by a financial institution that is not principally engaged in debt collection but who regularly seeks to collect on its own behalf on the debt it has purchased would raise transaction costs in sales of *all* debt—whether current or in default. The FDCPA nowhere defines what it means for a loan to be "in default," and the definition proposed by petitioners—"A loan is generally understood to go into 'default' within the meaning of the FDCPA only after a period of persistent nonpayment," Pet'rs Br. 45 n.47—hardly offers clarity. Nor does the court of appeals decision that petitioners cite for this standard, *Alibrandi* v. *Fin. Outsourcing Servs., Inc.*, 333 F.3d 82, 86-87 (2d Cir. 2003), offer a clear standard: it explains that "judicial decisions and regulations reflect inconsistent periods of time preceding default," though "they all agree that default does not occur until well after a debt becomes outstanding." *Id.* at 87.

The result, at least until there is a clear national standard, will be a rash of litigation about whether debt that was delinquent at the time of purchase formally reached a state of "default." As in *Alibrandi*, that may turn on a loan-by-loan, fact-specific inquiry, including the history of communications between the originator and the

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[42] *Id.* at 188.

borrower. *See id.* at 88. Recognizing this threat, debt sellers and purchasers may be forced to sift through large pools of loans[43] (a $3.55 billion portfolio in this case) to try to identify those that may be in "default" so that those loans could be removed or re-priced to reflect their greater litigation risk. The increased transaction costs will end up reflected in higher prices for, and reduced availability of, credit for individuals.[44, 45]

Third, all these costs may cause financial institutions that do not specialize in debt collection to reduce their purchases of debt, or simply forego debt purchases altogether. That would be a perverse result. As discussed *supra*, financial institutions

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[43] The FTC *Structure and Practices* report discusses 5,000 portfolios of debt, with a combined total of 90 million loans, an average of 18,000 loans per portfolio. *See* FTC *Structure and Practices*, *supra*, at T-2.

[44] For instance, if debt buyers require debt sellers to indemnify them against the inclusion of defaulted debt within a pool of loans—and thus against class actions of uncertain scope and size that would result if the Fourth Circuit's decision is reversed—debt sellers may not be willing to take on the additional risk and cost, and may curtail lending as a result.

[45] Further, reversal would have the unintended consequence of harming the relationship between lenders and individual borrowers. For instance, a bank representative leaving a voicemail for a borrower whose credit is in default may be required under the FDCPA to identify as a debt collector and provide a "mini-Miranda warning." *See* 15 U.S.C. § 1692e(11); Hoffman, *supra* at 563-65 (discussing "precarious" and "uncertain" case law). As a result, that borrower would be more reluctant to communicate with his creditor at the very time such communication is most important.

offering consumer credit services, like Santander, respond to the same reputational and regulatory incentives that Congress cited in excluding those and certain other kinds of creditors from the FDCPA, and are wholly unlike the specialized debt collectors that prompted Congress to enact the statute. The FDCPA should not be used as a tool to drive loan collections to the very entities whose practices the FDCPA sought to constrain.

CONCLUSION

For the foregoing reasons, and those stated in the Brief for the Respondent, the Court should affirm.

Respectfully submitted.

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